



**Project: “Integrated Natural Resource Management
in the Baikal Basin Transboundary Ecosystem”**



The Current Status and Options for Enhancing the Legal and Institutional Frameworks of Cooperation in the Protection and Sustainable Management of Transboundary Waters between the Russian Federation and Mongolia

Concept paper

April 2013

Summary

1. The Concept Paper was prepared pursuant to the Terms of Reference (Senior Law Expert) of the following UNOPS Project: “Integrated Natural Resource Management in the Baikal Basin Transboundary Ecosystem/00078317”.
The Concept Paper has a dual purpose. Its objective is: 1) to assess the current status of bilateral water cooperation between Mongolia and the Russian Federation (RF); ascertain existing gaps and inadequacies in the legal and institutional framework of transboundary cooperation and its implementation, and 2) to identify possible options in enhancing the extant legal and institutional framework and mechanisms of transboundary cooperation including, if necessary, new institutional arrangements (such as a Joint bilateral Commission), taking into account the latest trends in international practice of regulating and managing transboundary water resources.
2. Most of Mongolia’s water resources belong to transboundary river basins shared with RF and China. The greater part of transboundary water resources in the region are shared between Russia and Mongolia. There are several significant transboundary basins, some of which have genuinely global status. One such basin is formed by the Selenga River, which is the major tributary of Lake Baikal and forms the headwaters of the Yenisei-Angara system. Others include the Onon River (one of the source rivers of the Amur) and the Tes-Khem River, which is part of the Uvs Lake basin. Both Lake Baikal and the Uvs Lake basin have been included in the UNESCO World Heritage list as specially protected sites in 1996 and 2003 respectively.
3. Thus, the manner in which these transboundary water resources are managed, utilised and developed extends beyond the scope of the two countries’ bilateral relations. This imposes additional obligations on the two States – Russia and Mongolia – as the custodians of these unique aquatic resources and ecosystems. Due to the transboundary nature of the watercourses in question, their effective management, sustainable use and protection cannot be achieved through unilateral or uncoordinated actions and require a collaborative approach. To be successful bilateral cooperation must be based on a solid legal foundation, which includes both adequate normative framework and effective institutional arrangements.
4. It should be noted from the start that apart from legal instruments in force for the two countries (which will be discussed below) both Russia and Mongolia are bound by some *generally accepted legal principles* by virtue of their “customary law” nature. They include an obligation (and a right) to use transboundary waters in a reasonable and equitable manner [*principle of equitable and reasonable use*] and an obligation to take all appropriate measures to prevent causing significant transboundary harm [*‘no-harm rule’*]. These key legal principles are ‘operationalized’ through procedural rules – an obligation to exchange data and information on a regular basis, to undertake environmental impact assessment of all planned measures and activities which may have a significant adverse effect on other watercourse states, to timely notify potentially affected states of such measures, to consult each other and, if necessary, negotiate on the possible effects of planned measures.
5. The legally binding nature of these principles and rules is supported by significant state practice, embodied in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses and in the 1992 UNECE Convention on the Protection and Use of

Transboundary Watercourses and International Lakes. Although the 1997 UN Watercourses Convention is not yet in force, its key provisions are regarded as binding for all states regardless of their participation in the Convention. Similarly, the 1992 UNECE Convention (Russia is a party) is viewed as an effective and innovative regional legal framework, aimed at facilitating cooperation between the states sharing the same transboundary waters. It has been opened recently for accession to other states, which do not belong to the UNECE region.

6. Among multilateral treaties that are directly relevant to water cooperation between Russia and Mongolia the most important is the 1972 UNESCO Convention on the World Cultural and Natural Heritage, which imposes far-reaching obligations on those parties whose sites are included on the World Heritage List. Both Russia and Mongolia have such natural sites within their transboundary basins (Lake Baikal and Lake Uvs Nur) and are responsible for safeguarding them. Importantly, Art. 6 of the UNESCO Convention explicitly requires from its participants not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage situated on the territory of other states parties.

7. Another multilateral agreement of relevance in the context of transboundary waters is the 1971 Convention on Wetlands of International Importance (Ramsar Convention) - an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. The “wise use” concept, as applied to wetlands, is defined as “the maintenance of their ecological character, achieved through the implementation of *ecosystem approaches*, within the context of *sustainable development*”. The Ramsar states must designate suitable wetlands for the List of Wetlands of International Importance (“Ramsar List”), ensure their effective management, and cooperate internationally regarding, among other things, “development projects that may affect wetlands”. There are several sites both in Russia (e.g. the Selenga River delta) and Mongolia (Lake Uvs and its surrounding wetlands) within their transboundary river basins. Article 5 of the Ramsar Convention explicitly requires from the parties to consult with each other about implementing their obligations “where a water system is shared” by the parties.

8. However, transboundary cooperation at the bilateral level is usually based on bilateral arrangements. The Russian-Mongolian water relations have been governed by a number of such bilateral agreements, general and specific, which together establish both a normative foundation and appropriate institutional mechanisms. Currently they include the following intergovernmental instruments:

- Treaty on Friendly Relations and Cooperation (20.01.1993, Moscow) [Art. 10];
- Agreement on Cooperation in the Field of Environmental Protection (15.02.1994, Ulan-Bator) [Art. 2];
- Agreement on the Protection and Utilization of Transboundary Waters (11.02.1995, Ulan-Bator);
- Treaty on the Regime of the Russian-Mongolian State Boundary (12.08.2006, Moscow) [Section II “The regime of utilization of the boundary waters...” Arts. 10-14].

9. The core of the legal regime of transboundary waters is formed by the 1995 Water Agreement, which is a typical “framework” instrument, in many respects similar to bilateral

agreements concluded during the same period between Russia and Ukraine (1992), Russia and Kazakhstan (1992), and Mongolia and China (1994). The 1995 Water Agreement replaced two earlier intergovernmental instruments in this area: the 1974 Agreement on the Rational Utilization and Protection of Waters of the Selenga River Basin (Moscow, 03.07.1974) and the 1988 Agreement on Cooperation in the Field of Water Use on the Boundary Waters (Ulan-Bator, 09.12.1988).

10. The four agreements mentioned in para. 8 above together provide a functional, albeit limited, set of substantive and procedural rights and obligations. However, the framework nature of the 1995 Water Agreement means that it lacks specificity. The 1995 Agreement is not very different from its predecessors but even less detailed and looks outdated. It does not reflect some contemporary concepts and principles as the polluter-pays principle, ecosystem approach, sustainability of water utilization, which are present in most modern water treaties. Nor does it contain conventional requirements related to environmental impact assessment in a transboundary context; notification and consultation regarding planned activities that are likely to cause transboundary impact; access to information and public participation in the decision-making; detailed dispute settlement mechanism. Even in comparison with the 1974 Selenga Agreement, the 1995 Agreement lacks some typical procedural provisions – obligations to consult each other when planning water-related measures (Selenga, Art. 5) and to refrain from measures that may affect the river flow and water quality without prior mutual agreement (Selenga, Art. 9). The 1995 Agreement does not provide for any special governance regime for the most important of their shared basins – the Selenga River basin.

11. Any legal regime of transboundary water cooperation would be incomplete without institutional arrangements. The 1995 Water Agreement establishes such mechanism (the institute of Plenipotentiaries), which was practically inherited from the earlier agreements. While the institute of Plenipotentiaries used to be common mostly in Eastern Europe, it is increasingly replaced by another type of joint bodies – bilateral commissions.¹ In contrast to joint commissions, plenipotentiaries typically lack any additional staff or other organizational structure responsible for implementing the agreement and decisions taken.

12. Similar to other comparable agreements, the 1995 Water Agreement defines the tasks and responsibilities of the Plenipotentiaries in very general terms. At the same time, both RF and Mongolia have created also bilateral commissions with some of their neighbours (e.g., Russia with Finland, Estonia, Belarus, Kazakhstan, Azerbaijan; Mongolia with China). The most recent agreements (Russian-Azeri of 2010 and the new one between Russia and Kazakhstan) are particularly instructive in terms of their detailed description of the competencies, tasks and functions of the joint commissions. It is worth noting, that the 1994 Russian-Mongolian Environmental Agreement also establishes a Joint Commission responsible for its implementation. But this Commission has not been particularly active or effective in supporting interstate cooperation.

13. The juridical analysis of the existing legal frameworks applicable to the Russian-Mongolian bilateral water cooperation demonstrates that such cooperation has a normative

¹ See: River Basin Commissions and Other Institutions for Transboundary Water Cooperation: Capacity for Water Cooperation in Eastern Europe, Caucasus and Central Asia (UN, 2009), p. 10-11.

foundation composed of multilateral conventions and bilateral agreements. While the 1995 Water Agreement (together with other related bilateral instruments) provides the basis for such cooperation, neither its provisions nor its institutional mechanism fully reflect international best practices. Two possible options for improving the existing legal framework for transboundary waters can be submitted at this stage.

14. **Option 1.** One rather simple option is to continue to use the existing arrangements as a legal basis for cooperation and address specific issues through an additional protocol (or a set of protocols). This approach was applied until recently by Russia and Kazakhstan, which adopted a number of protocols on the joint management and protection of transboundary water bodies and coordination of water management activities in their shared river basins. The advantage of this approach is in a simple endorsement procedure based on the approval of these documents by the bilateral Commission, which does not require any additional formal approval at the governmental level.

15. **Option 2.** Another, more radical but also having a better potential in the longer term, option in strengthening the regulatory framework for transboundary cooperation is to develop and adopt a new comprehensive agreement which should rectify the obvious shortcomings of the existing one, including its institutional arrangements. This new agreement should be significantly more detailed from the point of view of the content of its “substantive” obligations, as well as its procedural norms, including procedures for the EIA in the transboundary context, notification and consultations in the event of planned measures. The institutional mechanism (ideally in the form of a joint commission) should be provided in more detail, including its sphere of competence, functions, structure and legal nature of decisions.

16. Regardless of what option is chosen, there is a need in an effective institutional mechanism – ideally by replacing the institute of Plenipotentiaries with a joint commission. Since water resources management and protection constitutes the most important aspect of bilateral environmental cooperation between RF and Mongolia, one might consider merging the existing institute of Plenipotentiaries and the joint commission, established under the 1993 Agreement.²

17. **Roadmap.** The future actions in this area will depend on the position of the countries concerned – whether they are willing to advance their bilateral cooperation in the field of transboundary water resources, including its legal and institutional frameworks. Thus, the principal assumption is that the two states agree on the need to improve and further develop substantive and procedural provisions of relevant international arrangements and the institutional mechanism.

18. The process will require proceeding through a number of steps.
Step 1 - to appoint an international legal expert with a task to develop the principal elements of a new comprehensive legal and institutional framework on transboundary water cooperation (2-3 months).

² This approach has precedents in state practice. The International Joint Commission (US-Canada), which was created by the 1909 Boundary Waters Treaty initially to deal with issues of transboundary waters, with time was entrusted with other tasks, such as transboundary air pollution.

Step 2 – to establish a working group of national experts (2-3 from each side supported by international expertise) assigned with a task to review the proposed principal elements of the legal and institutional framework and to develop a new legally binding instrument.

Step 3 – to conduct consultations/negotiations at the intergovernmental level on the draft legal instrument with a view to finalize it and submit to the respective governments.